# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1125

CLARENCE WILLIAMS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 418 F.2d 159. The judgment of the court of appeals was entered on October 17, 1969. A petition for rehearing en banc was denied on December 24, 1969. The petition for a writ of certiorari was filed on January 26, 1970 and is thus out of time under Rule 22-2 of this Court.

## QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish petitioner's possession of the narcotics.

2. Whether the search was reasonably incident to the lawful arrest under the standards which governed prior to the decision in *Chimel* v. *California*, 395 U.S. 752.

3. Whether the new rule announced in *Chimel* should be retroactively applied to cases pending on appeal at the time it was decided.

## STATEMENT

After a jury trial in the United States District Court for the District of Arizona petitioner was convicted of concealing illegally imported heroin in violation of 21 U.S.C. 174 (IR 1, 61; TTP 188, 200).[1] On February 26, 1968 he was sentenced to imprisonment for ten years (IR 68). On appeal his conviction was affirmed (Pet. App. A).[2]

The evidence, adduced on the motion to suppress (which was denied (TMS 313)) and at the trial showed the following: The government had reasonable grounds to believe that petitioner had been a

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[1] For the sake of uniformity, we use the same abbreviations designated by petitioner in his petition, *i.e.*, "TTP" for the transcript of the trial proceedings, and "TMS" for the transcript of the motion to suppress. We are lodging with the Clerk copies of these two transcripts.

[2] The court below found the evidence of possession insufficient as to codefendent Arlene Jackson, who was tried jointly with petitioner, and reversed her conviction (Pet. App. A).

party to an illegal narcotics sale on March 9, 1967 (IR 6-15, 21; TMS 7-8, 51-53, 69). Federal, state and city police officers of Phoenix, Arizona, continued to investigate petitioner and codefendant Jackson after March 9 to determine the source of the supply of the narcotics (TMS 12, 13, 16, 17, 19, 20, 253). A check of the local utility company's records showed that petitioner and Mrs. Jackson lived at 1402 East Granada in Phoenix (TMS 40). On occasions law officers had observed petitioner park a 1959 Chevrolet and a 1967 Cadillac in front of this residence, and had seen petitioner and Mrs. Jackson enter and leave (TTP 14-15, 67-68, 82). One officer testified that he had observed the East Granada premises for several weeks prior to March 31, 1967, and had not seen anyone other than petitioner or Mrs. Jackson entering or leaving the premises (TTP 41).

At 4:30 p. m. on March 30, after the officers had concluded that further investigation as to the source of supply would no longer be fruitful, they obtained a warrant for petitioner's arrest for the illegal sale of heroin that had occurred on March 9 (TMS 21, 24). At 8:00 p. m. that evening, federal, state and local officers had a meeting, at which they were instructed to go to different locations to find petitioner, and to arrest him pursuant to the warrant (TMS 28, 84, 135, 141, 201-202, 244-245, 303). No search warrant had been issued for the East Granada premises (TMS 49, 101, 214, 254). Four officers testified that at the meeting there was no discussion about plans to search the East Granada premises as incident to petitioner's arrest (TMS 29, 91, 203-204,

248-249). Officer Gutierrez testified that at the meeting a search of these premises pursuant to a search warrant was discussed (TMS 281-282).

Starting at about 9:00 p. m. (TMS 29-30, 92, 187), the officers went to various locations known to be frequented by petitioner, including his home on East Granada and his business address in downtown Phoenix (TMS 30, 32-33, 92-94, 245-247). While the officers were looking for petitioner, according to his own testimony, from 5:50 p. m. when he left his East Granada residence until his return at 11:40 p. m., he was constantly on the move, going to his business address, various cocktail lounges and to a dog track (TMS 287-290, 293, 295-297). When petitioner drove up to his home in his Cadillac, it was the first time that day that the officers had seen him (TMS 23, 67, 136, 184, 221, 256). Agent Watson notified the other officers by police radio that petitioner had arrived home and the officers met at the East Granada address (TMS 59, 94).

At 12:10 a. m., agent Watson knocked on the front door, stated that he was a federal narcotics agent, and that he had a warrant for petitioner's arrest (TMS 34-35). After Mrs. Jackson opened the door, Watson entered and arrested petitioner in the living room (TMS 36). In the meantime other officers entered the home through various entrances (TMS 37, 59). Petitioner and Mrs. Jackson were the only persons on the premises other than the officers (TTP 13).

When agent Watson arrested petitioner, the latter was sitting on a sofa in the living room, eating a

meal and watching television. He was dressed in his underwear and a robe, and wore slippers (TTP 12-13, 69). For approximately two hours following the arrest, the officers conducted a search for heroin and other evidence of the crime (TMS 38, 105-106, 192, 196, 214-215, 252-253, 255; TTP 21). The search resulted in the seizure of cocaine, marihuana, $500 in government funds which had been used to purchase narcotics, and several loaded revolvers and rifles (TMS 45-46, 158). On a shelf in the closet in the northeast bedroom the officers seized a metal container, which had in it five rubber containers of heroin. (TTP 62-63, 76, 114).[3] This was the only closet in the bedroom; it also contained men's and women's clothing, one or two purses, men's hats and numerous shoes (TTP 65, 76). The room contained a double bed and a dresser in which there were men's and women's underclothing, some jewelry and socks (TTP 22-23, 65). Before leaving with the arresting officers, petitioner dressed in this bedroom, taking clothing from the dresser and closet (TTP 21, 22, 33, 69).

## ARGUMENT

As noted the petition is out of time.

1. The holding that petitioner had possession of the narcotics is amply supported by the record. The totality of the circumstances showed that petitioner had possession and control of the East Granada

[3] 124.950 grams of this heroin was introduced at the trial as Government Exhibit 1, (TTP 15, 23, 70, 113-114).

residence; that when he left with the arresting officers he wore his own clothing taken from the closet and dresser of the northeast bedroom; that the heroin was found on the shelf of the same closet from which he took some of his clothes; that he "could have reached for the heroin as easily as he reached for his coat," as the court below observed (Pet. App. 24); and that accordingly, the jury could reasonably infer that petitioner had dominion and control over the metal container in which the heroin was found, even though no evidence was presented to show that the container bore his fingerprints. See *Hernandez* v. *United States*, 300 F.2d 114 (C.A. 9); *Evans* v. *United States*, 257 F.2d 121, 128 (C.A. 9), certiorari denied, 358 U.S. 866. *Delgado* v. *United States*, 327 F.2d 641 (C.A. 9) (Pet. 14-15) is distinguishable. In that case there was no evidence showing that the codefendants had exclusive possession of the premises, and no evidence to link either of them with the night stand in which the marihuana was found.[4]

2. The search was a reasonable incident to the arrest under the law as it existed prior to this Court's decision in *Chimel* v. *California*, 395 U.S. 752. It was directed at the fruits and evidence of the criminal behavior for which petitioner had been arrested (see *Warden* v. *Hayden*, 387 U.S. 294, 307), and as

[4] The holding of the court of appeals that defendant Jackson was not shown to have sufficient possession of the narcotics was based on a discriminating analysis of *her* relationship to the premises. It is in no way inconsistent with the finding that petitioner had possession, since petitioner's relationship to the premises and to the area in which the narcotics were found was much more significant (see Pet. 23-24).

the court below concluded, "was not of an area more extensive than that permitted" in *Harris* v. *United States*, 331 U.S. 145 (Pet. App. A 23).[5]

Nor was the arrest a pretext to conduct the search. The three week delay between the March 9 transaction and the procurement of the warrant was legitimate and reasonable investigative procedure aimed at discovery of the source of the heroin. "There is no constitutional right to be arrested", *Hoffa* v. *United States*, 385 U.S. 293, 310. Once the warrant was issued the officers did not avoid arresting petitioner at any place but his residence. On the contrary, they made a determined effort to locate him at numerous places other than his home. Their lack of success in this regard was not the product of a calculated plan,[6] but was simply due to the fact that petitioner—as he himself testified—was constantly on the move on the night of the arrest. (See TMS

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[5] Petitioner cannot fairly rely (Pet. 11) upon *Von Cleef* v. *New Jersey*, 395 U.S. 814, or *Shipley* v. *California*, 395 U.S. 818. In *Von Cleef*, the officers searched "a three-story, 16-room house from top to bottom" and seized thousands of items. (395 U.S. at 816). In *Shipley*, the search of the house was sought to be justified on an arrest in the street some 15 or 20 feet from the house (395 U.S. at 819). In neither case, this Court held, was the search a reasonable incident to the arrest under pre-*Chimel* law.

[6] The district court had ample basis to conclude that no plan to search the residence was discussed at the meeting held immediately before the officers began their search for petitioner. Four officers in attendance at this meeting testified that no such plans were discussed (see TMS 29, 91, 203-204, 248-249); and the only officer who testified to the contrary was of the erroneous view that the officers were proceeding under a search warrant (TMS 281-282).

287-290, 293, 295-297). The officers exercised due diligence to achieve the execution of the warrant. Their conduct should not be suspect because they were able to locate petitioner only at his home. See *United States* v. *Weaver*, 384 F.2d 879 (C.A. 4), certiorari denied, 390 U.S. 983.[7]

3. The court of appeals rejected the contention that the narrower search rule adopted in *Chimel* v. *California*, 395 U.S. 752, should be applied to this case, which was pending on appeal when *Chimel* was decided. It reasoned that since this Court in *Desist* v. *United States*, 394 U.S. 244, had held *Katz* v. *United States*, 389 U.S. 347, prospective only, the same rationale would govern to render *Chimel* prospective in application (Pet. App. 21-22). Other courts of appeals have come to the same conclusion. See, *e.g.*, *United States* v. *Bennett*, 415 F.2d 1113 (C.A. 2); *Lyon* v. *United States*, 416 F.2d 91 (C.A. 5), certiorari denied, January 12, 1970 (No. 1072 Misc., this Term); see also, *United States* v. *Edelman*, 414 F.2d 539 (C.A. 2), certiorari denied, January 26, 1970 (No. 798, this Term). It is our submission that this is the correct view. Nevertheless, this Court has recently granted a petition for certiorari in *Elkanich* v. *United States*, No. 1142, this Term, certiorari granted, February 2, 1970, which involves, as one of its issues, the applicability of

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[7] *United States* v. *James*, 378 F.2d 88 (C.A. 6) (Pet. 10) is inapposite since there the officers met shortly prior to the arrest to plan petitioner's arrest at her apartment, made no attempt to execute the warrant elsewhere, and "descended en masse upon the apartment" (378 F.2d at 90).

*Chimel* to a case which was final at the time *Chimel* was decided and in which relief is sought under 28 U.S.C. 2255. Therefore, should the Court deem it appropriate to waive its time requirements, it may wish to defer consideration of the instant case until after it decides *Elkanich*.

## CONCLUSION

The petition for a writ of certiorari should be denied unless the Court deems it appropriate to defer passing on the instant petition until after it decides *Elkanich* v. *United States*, No. 1142, this Term.

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